Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA BY AND THROUGH JOSEPH E. GARST,

Petitioner,

v.

LOCKHEED-MARTIN CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner-Plaintiff brought suit individually and on behalf of the United States under the *qui tam* provisions of the False Claims Act against Respondents Lockheed Martin Corporation and its subsidiaries and related entities seeking recovery of in excess of $150 Million defrauded from the public fisc by false and fraudulent claims presented to and paid by the Department of Veterans Affairs. The district court limited its review to causes of action arising out of false representations and characterized Lockheed's actions as routine breaches of contract. The district court rejected the implied certification theory of liability recognized in other circuits and dismissed Petitioner's suit, without leave for further amendment, finding that the Petitioner had not and could not state a claim under the False Claims Act on the facts presented. The appellate court affirmed, disclaiming the relationship between ethical violations and causes of action for presentment and payment of fraudulent claims under the False Claims Act.

The questions presented are:

1) Whether the court of appeals so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the district court as to call for the exercise of this Court's supervisory power.

2) Whether the court of appeals abused its discretion and committed clear error in dismissing suit for relief under the False Claims Act for false and fraudulent claims submitted and paid pursuant to schemes primarily accomplished by corrupt relationships with former Presidential appointees including a former Acting Secretary of the Department of Veterans Affairs and government contractor.

3) Whether violations of public corruption laws, including 18 U.S.C. § 207 and 31 U.S.C. § 1352, which influence the Government to approve claims which otherwise would not have been approved and pay monies it otherwise would not have paid constitute fraudulent claims under the False Claims Act.

4) Whether accomplishing the goals of the False Claims Act requires a liberal interpretation of pleadings, and whether the balancing of Fed. R. Civ. P. 8(a) and Fed. R. Civ. P. 9(b) require greater care in weighing the sufficiency of allegations in a False Claims Act complaint.

LIST OF PARTIES TO THE PROCEEDINGS

1. The Petitioner-Relator, Joseph E. Garst.

2. Respondents are as follows:

a. Lockheed Martin Corporation, a foreign, for profit corporation, individually and as parent, successor in interest and d/b/a each of the following: Lockheed Martin Missiles and Space Co., Inc.; Lockheed Missiles and Space Co., Inc.; Lockheed Martin Information Management Services Co., Inc.; Lockheed Information Management Services Co., Inc.; Lockheed Martin Integrated Solutions, Co., Inc.; and Lockheed Integrated Solutions Co., Inc.

b. Lockheed Martin Missiles and Space Co., Inc. a foreign, for profit corporation, individually and as parent, successor in interest and d/b/a each of the following: Lockheed Martin Missiles and Space Co., Inc; Lockheed Martin Integrated Solutions Co., Inc; and Lockheed Integrated Solutions Co., Inc.

c. Lockheed Martin Information Management Services Co., Inc., a foreign, for profit corporation, individually and as parent, successor in interest and d/b/a each of the following: Lockheed Information Management Services Co., Inc.; Lockheed Martin Integrated Solutions Co., Inc.; and Lockheed Integrated Solutions Co., Inc.

d. Lockheed Martin Integrated Solutions Co., Inc., a foreign, for profit corporation, individually and as parent, successor in interest and d/b/a Lockheed Integrated Solutions Co., Inc.

e. Lockheed Integrated Solutions Co., Inc., a foreign for profit corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Grady, D.J.), dismissing petitioners' Amended Complaint with leave to amend (Appendix ("Pet.App.") is published at 158 F. Supp.2d 816 (N.D. Ill., 2001). The district court's subsequent opinion ordering a more definite statement is not otherwise published. The district court's subsequent opinion dismissing petitioners' Third Amended Complaint with prejudice is published at 2002 WL 1794004 (N.D. Ill., 2002). The court of appeals' opinion (per Easterbrook, C.J., joined by Posner and Cudahy), affirming, is published at 328 F.3d 304 (7th Cir. 2003). The court of appeals' order denying rehearing and rehearing en banc is not otherwise published.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on May 8, 2003, and denied rehearing and rehearing en banc on June 2, 2003. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the False Claims Act, 31 U.S.C. § 3729, *et seq.*, 31 U.S.C. § 1352(a)(1) and (b)(1), 18 U.S.C. § 207(a)(2) and (c) relevant to this petition are printed in the Appendix at 38a.

STATEMENT OF THE CASE

Petitioner-Plaintiff brought suit individually and on behalf of the United States under the *qui tam* provisions of the False Claims Act against Lockheed Martin Corporation and its

subsidiaries seeking recovery of in excess of $150 Million defrauded from the public fisc by false and fraudulent claims presented to and paid by the Department of Veterans Affairs. These claims arose under two Federal procurement programs for computer goods and services, which Lockheed promised tc provide pre-proven and pre-tested to contract specifications prior to presenting claims for payment. These programs were known as the National Office Automation, Veteran Affairs Progam and the Veteran Benefits Administration Modernization Program. As the computers and systems to be acquired would primarily be dealing with personal medical information, personal financial information and procurement or competition sensitive information, security specifications of the contract were key considerations. In its Best and Final Offer, Lockheed promised to provide systems rated to the Department of Defense C2 level of security. The National Office Automation, Veterans' Affairs program was funded with $298 million for ten years with Lockheed as the sole vendor. The contract was structured as an initial contract with nine renewable options. The Veterans Benefits Administration Modernization Program had a budget of $220 million.

By the end of 1992, the first full year of contract performance, the VA initially refused acceptance for non-conformance and denied payment of over $28 million in claims presented by Lockheed. Lockheed subsequently obtained payment of the entire $298 million in six years, using a multiplicity of fraudulent acts and schemes including bribery, presenting false claims for payment and obtaining payment of false claims by use of undue influence, public corruption and a death threat. Lockheed successfully subverted the matrix of protections provided to the Government by statutes, regulations, contract provisions and the loyal services of its employees, which was primarily accomplished through the use of undue influence by illegally engaging the services of "revolving door" Presidential appointees, including the former Acting Secretary

of the Department, as well as the VA's former Assistant Secretary of Finance.

Petitioner's pleadings set forth the false representations and fraudulent acts allowing Lockheed to receive public monies it otherwise would not have received with clarity and precision. For example, when in April of 1992, Lockheed's unpaid invoices totaled over $20 million, Lockheed responded by purchasing dinner tickets valued at $1,150 each for then Deputy Secretary Anthony Principi and several of his Senior Executive Service contracting assistants. The dinner was held in June, 1992. Within days, Lockheed wrote to one of Deputy Secretary Principi's assistants invited to the dinner and asked him to intervene and expedite payment of its unpaid invoices, even though Lockheed failed to obtain customer acceptance as required by the contract.

Throughout the contract performance, Lockheed maintained that its systems could meet critical contract requirements, such as security capability, when in truth and in fact, it knew it could not. Petitioner provided to the court, an internal Lockheed memorandum dated February 10, 1993, attached as Exhibit 45 to its Third Amended Complaint, in which a Lockheed chief engineer admitted that Lockheed's systems could not meet critical contract requirements and that it was just a matter of time until the government learned of the nonconformance of its delivered systems.

In a major project under the program, the Local Area Network/Wide Area Network for the Department's Office of Acquisition and Materiel Management, Lockheed never brought its promised computer network operational despite five years of testing and effort. This occurred despite Lockheed's representations in its Best and Final Offer that all systems were pre-proven and pre-tested prior to delivery. In over five years, Lockheed could never reproduce the successful network test results that it represented had been conducted. Millions of dollars

of equipment delivered by Lockheed was so defective that it was merely warehoused and finally discarded. Concurrently, millions of dollars in labor for system installation and implementation were expended without any benefit to the Government.

In August, 1993, nine months after Acting Secretary Anthony Principi left office, Lockheed recruited him to serve as a consultant to increase its sales and revenues under the National Office Automation, Veterans Affairs contract. This occurred despite the fact that Lockheed knew that Acting Secretary Principi was personally and substantially involved in both the National Office Automation, Veterans Affairs Program and the Veterans Benefits Administration Modernization Program. Lockheed further knew that the Department had determined to accomplish many of the goals of the Veterans Benefits Administration Program using the Lockheed National Office Automation, Veterans Affairs contract.

Petitioner pled with clarity and precision the ways in which Acting Secretary Principi was personally and substantially involved in these programs. Petitioner noted that in August of 1992, Deputy Principi summoned key opponents to the Lockheed contract to an executive session. He affirmed to them the Department's commitment to the program and the Lockheed contract and urged them to recognize the importance of the program. This occurred despite a memorandum from the Department Inspector General in April, 1992, notifying Department contracting officials that next generation computers were available under better terms and lower prices from an accessible Department of Defense contract. At a joint executive working session in August of 1992, Lockheed requested then Deputy Secretary Principi to serve as the ultimate arbiter of all disputes arising out of its contract.

Petitioner alleged that similarly, Lockheed knew that former Acting Secretary Anthony Principi had been personally and

substantially involved in the Veterans Benefits Administration Modernization Program. Former Acting Secretary Principi defended this program from opposition by Congressman John Conyers, sought to call off an investigation into the program by the Government Accounting Office and awarded a contract under the program over the protests of Congressman Conyers. Lockheed, through negotiations with the Department of Veterans Affairs, had obtained its commitment to accomplish significant portions of the goals of this program through the Lockheed contract.

Petitioner alleged that notwithstanding Lockheed's knowledge of former Deputy Secretary Principi's personal and substantial involvement in the two programs, it entered into a series of consulting and employment relationships with him to increase sales under the National Office Automation, Veterans Affairs contract. Petitioner provided copies of the consulting contracts with its pleadings. The first was cloaked by purporting to be a contract for legal services with a California law firm. The clear text of the contract, however, called for the personal services of Anthony Principi to increase revenues under the subject contract and to recruit "subject matter experts" to assist Lockheed with the contract.

In response to continuing resistance by Department finance personnel to issuing payment for Lockheed's invoices, former Deputy Secretary Principi recruited another Presidential appointee S. Anthony McCann, his former Assistant Secretary of Finance, to prepare a report for Lockheed concerning the subject contract. Former Assistant Secretary of Finance McCann was hired as a Lockheed consultant approximately nine months after leaving office. He also was personally and substantially involved in both programs. Former Assistant Secretary McCann summoned key VA executives, including a leading critic of the Lockheed contract, to the executive briefing wherein former Acting Secretary Principi urged them to continue to support the

Lockheed contract. Further, it was McCann's finance personnel, who continued to resist issuing payments to Lockheed for nonaccepted goods and services.

Petitioner alleged that significantly in September, 1993, concurrent with the initiation of the consulting relationships with former Acting Secretary Principi and former Assistant Secretary of Finance McCann, Lockheed's invoice for payment under a disputed program was paid in the amount of $1.3 million. Further, at the same time, Lockheed received an order for approximately $5.6 million of equipment under the National Office Automation, Veterans Affairs contract, in support of the Veterans Benefits Administration Modernization Program.

Petitioner pled the specifics of these relationships and attendant activities with clarity and precision, noting to the Court specific dates of meetings and lobbying activities. Petitioner was able to attach as exhibits copies of consultant contracts, invoices, plane tickets and checks issued. Expense invoices from Deputy Secretary Principi contained notations requesting compensation for "lobbying public officials" and "meeting attendance with VA."

In 1995, former Acting Secretary Anthony Principi was hired as the Chief Executive Officer of the Lockheed subsidiary with responsibility for the subject contract. Significantly, Petitioners alleged that in 1996 program funds under the National Office Automation, Veterans Affairs contract were exhausted. Anthony Principi tried and failed to have this contract extended. Following this failure, he resigned as a Lockheed official, noting in his letter of resignation that he had nothing more to contribute. Despite Lockheed's representations that it was capable of providing pre-proven and pre-tested technology, after six years and $298 million, Lockheed never produced the systems promised to operational requirements.

Petitioner voluntarily amended his original complaint upon substitution of counsel. The district court dismissed the First Amended Complaint primarily for failure to comply with Fed. R. Civ. P. 9, which requires that fraud be pled with particularity. Petitioner filed a Second Amended Complaint under seal in accordance with the provisions of the False Claims Act so that the Department of Justice could determine whether it would intervene. The Department of Justice declined to intervene. Following that determination, Petitioner, for the second time, voluntarily amended his complaint. This was done to limit the scope of the case in light of the limited resources available to Petitioner to prosecute the case without the assistance of the Department of Justice and to further enhance the specificity of the fraud alleged, consistent with the prior opinions of the district court. This Third Amended Complaint included ten counts. Among these counts were counts seeking recovery for the presentment and payment of false or fraudulent claims, the use of false records, a conspiracy count and separate enumerated counts for the submission and payment of false or fraudulent claims pursuant to the violation of procurement ethics statutes 18 U.S.C. § 207 and 31 U.S.C § 1352. This was done to assist the court in analyzing and handling the various bases of liability presented by Lockheed's conduct in violation of the False Claims Act.

The count under 31 U.S.C. § 1352 was considered particularly significant on its own. This relatively new statute was specifically designed to protect the public fisc from harm based upon improper lobbying activity — exactly what occurred in part in this case. In it pleadings, Petitioner alleged that the violations of this statute by Lockheed created implied certifications giving rise to liability under the False Claims Act. In argument before the appellate court, Petitioner noted that, given the statutory provisions, these certifications could more accurately be described as imputed by operation of law.

The Third Amended Complaint provided a table of contents (pages ii-v) which listed a glossary of acronyms in an appendix for ready reference by the court and parties if the definition of an acronym was missed in the reading of the body of the complaint. OA&MM is listed in the glossary among the other acronyms, and the glossary indicates where the acronym first appears in the complaint.

After reviewing the complaint, the district court directed the Petitioner to prepare a more definite statement to supply the specifics required by Fed. R. Civ. P. 9(b), and set out what the Petitioner had to put in that statement. The district court also required the Petitioner to indicate which paragraphs of the Third Amended Complaint related to which of the ten counts therein.

Petitioner prepared the More Definite Statement to supplement rather than replace the Third Amended Complaint with the specific facts that the district court requested and included references to specific paragraphs in the complaint that related to a particular count as the district court required. Petitioner provided all information requested concerning its conspiracy count.

The district court ignored the plain statutory language of the False Claims Act and the precedents of this Court; limited its review to causes of action arising out of false representations, and characterized Lockheed's actions as routine breaches of contract. The district court found the Petitioner's pleadings to be prolix, confusing and cumbersome. The district court acknowledged that a claim may have been stated in the total allegations presented by Petitioner. The court maintained, however, that it was not obliged to parse allegations to identify a claim. The court adopted a "shotgun pleading" theory proffered by Respondents by citation to two cases from the Eleventh Circuit. *Anderson v. District Board of Trustees of Central Florida Community College*, 77 F.3d 364, 366 (11th Cir. 1996)

and *Byrne v. Nezhat*, 261 F.3d 1075, 1130 n.108 (11th Cir. 2001). This theory apparently seeks to create an exception to the dismissal standard established by the precedents of this Court in *Conley v. Gibson*, 355 U.S. 41 (1957); *Hishon v. King & Spalding*, 467 U.S. 69, 83 (1984); and *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002). In reality, this purported standard is so subjective as to be unmanageable. As demonstrated in this case, it allows for abusive application at the whim of the lower courts. Even though the case was at the very beginning stages of litigation, the district court noted as part of its rationale that Petitioner's pleadings would be impossible to present to a jury and were too lengthy and cumbersome to deal with.

The court also rejected the implied certification theory of liability recognized in other circuits and dismissed Petitioner's suit, without leave for further amendment, finding that the Petitioner had not and could not state a claim under the False Claims Act on the facts presented.

The appellate court affirmed, adopting the characterization of Lockheed's actions as routine breaches of contract, finding that the Petitioner had not properly alleged one false or fraudulent claim, holding that the courts did not have to read the allegations presented in pleadings if the pleadings were too lengthy to determine whether a claim could be made from the facts alleged, and disclaiming the relationship between ethical violations and causes of action for presentment and payment of fraudulent claims under the False Claims Act. In its opinion, the court of appeals described the Third Amended Complaint and the More Definite Statement as too lengthy, with too many acronyms.

REASONS FOR GRANTING THE PETITION

This petition should be granted for the following reasons:

First, the writ should be granted to honor the covenant between the nation and the men and women who have served, now serve and will serve in its Armed Forces. It is imperative that our veterans, as well as current and future servicemen and women know that the Government will redress the theft of hundreds of millions of dollars appropriated by Congress for their care. It is unacceptable for every Government official and institution charged with redressing this situation to do nothing.

Second, the writ should be granted because the actions of the Seventh Circuit Court of Appeals constitute both abuse of discretion and clear error, depart so far from the accepted and usual course of judicial proceedings, and have sanctioned such a departure by the district court as to call for the exercise of this Court's supervisory power.

Third, the Seventh Circuit's decision conflicts with holdings of this Court and other circuits in three important aspects. The decision defiantly disregards the repeated and recent precedents of this Court concerning the standard for dismissal with prejudice in *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002); *Conley v. Gibson*, 355 U.S. 41 (1957) and *Hishon v. King and Spalding*, 467 U.S. 69 (1984); and concerning the full scope of the False Claims Act. *United States v. Neifert White Co.*, 390 U.S. 228 (1968) and *Cook County v. U.S. ex rel. Chandler*, 123 S. Ct. 1239 (2003). Additionally, the decision refused to recognize the doctrine of implied certification, as held in *Shaw v. AAA Engineering*, 213 F.3d 519, 531-33 (10th Cir. 2002); *U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*, 2002 WL 31856364 (D.D.C. 2002). *See also U.S. ex rel. Siewick v. Jamieson Science and Engineering Inc.*, 214 F.3d 1372 (D.C. Cir. 2000).

Fourth, the writ should be granted because there exists today a clear and present danger to the public fisc. The two primary parties involved in the conspiracy which defrauded the public fisc of hundred of millions of dollars remain in power today. Anthony Principi, the former Acting Secretary of the VA and the co-conspirator with Lockheed, is the current Secretary of the Department. He presides over one of the largest budgets within the Executive Branch. Lockheed Martin remains today the nation's largest government contractor. A refusal by this Court to intervene will be viewed as a validation of a highly effective protocol for the piracy of public funds. The potential future consequences to the nation's financial well being are disastrous.

Fifth, the writ should be granted to protect the integrity of the country's reputation as a nation committed to the rule of law.

I. Intervention By This Court Is Necessary To Honor The Covenant Between The Nation And The Servicemen And Women Of The Armed Forces.

Unless this Court intervenes, the record will close with every Government official and institution responding to the theft of hundreds of millions of dollars appropriated for the care of veterans and their dependents by doing nothing. This is an unacceptable dereliction of duty to and breach of faith with the servicemen and women of the Armed Forces—past, present and future.

The interests of the nation and its veterans must be weighed against all other interests presented. It is unclear what interests compelled the appellate and district court to dismiss this suit without further leave to amend. The decisions do not clearly identify the specific reasons or rationale in the context of controlling precedent.

Petitioner responded to the directions of the district court in good faith. We ask this Court to take judicial notice of the fact that Petitioner's litigation team was expanded after the filing of the Second Amended Complaint to include a former Department of Justice strike force leader and former U.S. Attorney, with extensive experience in *qui tam* litigation. A primary reason for this expansion was to enhance Petitioner's ability to satisfy all of the court's expectations in the prosecution of this case.

There were other, less drastic methods available to the courts for addressing any continuing deficiencies with the Petitioner's pleadings. Any need to edit the pleadings does not outweigh the interests of the nation and its veterans in redressing a fraud which inflicted hundreds of millions of dollars of damage to the public fisc and the intended beneficiaries of the Congressional appropriation to the Department of Veterans Affairs.

II. Certiorari Is Warranted Because the Decision Below Conflicts With Decisions Of This Court And Other Circuits.

The Seventh Circuit's decision conflicts with holding of this Court and other circuits in three important aspects. The decision conflicts with the recognized basis for final dismissal of a complaint without leave to further amend. Second, the decision defiantly disregards the repeated and recent precedents of this Court concerning the full scope of the False Claims Act. Additionally, the decision refuses to recognize the doctrine of implied certification of false claims as recognized by other circuits. *Shaw v. AAA Engineering & Drafting, Inc.*, 213 F.3d 519, 531-533 (10th Cir. 2002) and *U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*, 2002 WL

31856364 (D.D.C. 2002). *See also U.S. ex rel. Siewick v. Jamieson Science and Engineering,* 214 F.3d 1372 (D.C. Cir. 2000).

A. The Decision Below Conflicts With The Holding Of This Court And Other Circuits Concerning Basis For Dismissal Of A Complaint With Prejudice.

Prior decisions of this Court in *Hishon v. King & Spalding*, 467 U.S. 69, 83 (1984) and *Conley v. Gibson*, 355 U.S. 41 (1957), for example, have held that a court cannot dismiss a complaint under Fed. R. Civ. P. 12(b)(6) unless it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations in the plaintiff's complaint. The decision of the court of appeals conflicts with these holdings, as well as with the Seventh Circuit's own precedent in this regard. *Cook v. Winfrey*, 141 F.3d 322, 327 (7th Cir. 1998).

The lower court's decision also conflicts with this Court's precedent as to the sufficiency of a complaint under Fed. R. Civ. P. 8. In *Swierkiewicz v. Sorema, N.A.*, this Court explicitly held that a pleading is sufficient if it puts the defendant on notice as to the conduct with which he is charged.

The lower court's disregard of the classic rule of sufficiency of pleadings is best illustrated in its treatment of Petitioner's conspiracy count. Despite Petitioner's full compliance with all instructions noted by the district court, the court of appeals affirmed dismissal of this count. Neither the district court nor the appellate court articulated any specific deficiency in this count. The More Definite Statement contained the additional specific conspiracy allegations requested by the district court for Count III of the Third Amended Complaint. This statement described the agreement and acts in furtherance thereof and is paraphrased here.

The conspirators, including John Brophy, Dan Tellup and Vince Marafino of Lockheed agreed to illegally engage former VA officials to influence their former colleagues to extend the contract and get invoices for non-conforming goods and services paid by the VA. Anthony Principi and S. Anthony McCann, former VA officials, agreed to lobby VA officials to extend the contract and pay fraudulent invoices in return for monetary compensation. This agreement between Lockheed and Principi and McCann violated the Ethics in Government Act, 18 U.S.C. § 207(a)(2) and (c). The co-conspirators knew that Lockheed's certifications and warranties submitted with every claim for multi-user systems that the hardware and software performed in accordance with the specifications of the contract. The co-conspirators also knew that Lockheed billed for systems which did not contain C2 security as required by the contract, and that Lockheed unbundled, double billed and price gouged the VA. Acts in furtherance of the conspiracy, as alleged in Petitioner's complaint, include the following:

(1) On or about September 29, 1992, Lockheed's Dan Tellup, Robert a/k/a Vince Marafino, John Brophy, Ed Gund and others had a meeting and planned to hire VA Subject Matter Experts to influence and to lobby VA executives to grant extensions of the NOAVA Contract, to increase NOAVA sales, and to get paid the false claims Lockheed had presented to the VA.

(2) In or about August 1993, Lockheed's John Brophy met with Anthony J. Principi in Santa Clara, California.

(3) Between on or about August through November 1993, Lockheed's John Brophy, Ed Gund, Robert Downing and John McCarey executed a false covert agreement to pay to Adams Duque & Hazeltine $5,000 per month to provide consulting services of Anthony J. Principi.

(4) On or about September 1,1994, Anthony J. Principi sent a bill of $35,327.07 to Lockheed's Ed Gund for Principi's services lobbying VA executives and public officials.

(5) On or about November 1, 1993, S. Anthony McCann sent a letter from Silver Spring, Maryland to Lockheed's Ted Sieverson.

(6) On or about January 6, 1994, Lockheed manager Dennis Dougherty approved a $6,000 check to S. Anthony McCann in Silver Spring, Maryland.

(7) In or about August 1, 1994, Anthony J. Principi sent an invoice to Lockheed's Ed Gund in Washington, DC for his services under the covert consulting agreement for meeting in July 1994 with VA officials regarding the NOAVA contract and with fellow co-conspirators James DeWire and Al Zamberlan.

(8) In or about 1995, Lockheed's James Janssen threatened Tim Ortel, a former Lockheed subcontract administrator, that Ortel should not pursue auditing allegations of irregularities in labor rates of a Lockheed subcontractor charged to the NOAVA contract and paid for by the VA or else Mr. Ortel would find himself dead.

(9) On or about February 6, 1995, Lockheed's Ed Gund prepared a false payment voucher to Adams, Duque and Hazeltine of $25,000 for Anthony J. Principi's marketing of Lockheed's NOAVA contract with the VA, where the payment went directly to Mr. Principi.

(10) On or about May 17, 1995, Anthony J. Principi recently employed by Lockheed, sent a memo to Lockheed employee Ron Jury asking him to suppress the details of Principi's relationship with the VA contract while at the VA in a press release.

The complaint and the More Definite Statement also allege that a false claim was presented by T. A. Sieverson, an official of Lockheed, to Steve Stapleton, a Veterans Administration ("VA") government official, on April 9, 1993 and August 9, 1993 in the total amount of Two Million Five Hundred Eighty-Four Thousand Nine Hundred Twenty-Six Dollars and Four Cents ($2,584,926.04) for the equipment and services provided for Phase I and Phase II of the government contract for the Office of Acquisition and Material Management network project. The Lockheed official's cover letter certified that the claim was made in good faith and was accurate and complete. The More Definite Statement included evidence that Lockheed officials knew, prior to presentation of that claim, that the equipment failed to provide C2 security[1], password protection, multi-user access, dynamic linking, and adequate file locking as required by the contract, yet required payment in full for its claim. The contract mandated that Lockheed's act of presenting a claim was Lockheed's certification that the product was installed and operational and, further, warranted all items to perform in accordance with the contract's requirements. The contract required Lockheed to supply C2 security as part of the contract price. Lockheed's officials lied that the equipment they supplied to the VA provided C2 security and then fraudulently doubled-

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1. The panel misapprehended the materiality and importance of Appellees' clearly false representation that all Lockheed systems had a C2 level security rating. The panel stated, "Other parts of the complaint and statement suggest that the shortcoming that most concerns Garst is Lockheed's inability to make the network secure enough for the transmission of military secrets, though an outsider might suppose that a database of pensions and health benefits does not require quite that degree of sophisticated encryption." Panel decision at 6 The panel overlooked paragraphs 220-221 in the Third Amended Complaint which alleged that the VA required C2 security to protect individual personal medical information and procurement competitive bidding sensitive data. The panel also overlooked Appellant's allegation that Lockheed knowingly provided systems that could not provide even password protection.

billed the VA for an upgrade of the software that a Lockheed official falsely claimed in a letter this time really did provide C2 security, password protection, multi-user access, dynamic linking and file locking, when the contract required Lockheed to provide those material requirements at no additional contract cost.

During oral argument, the court of appeals directed Appellees' attention to the specific allegations of false representations contained on specific pages of the More Definite Statement. Appellees' counsel conceded the specificity of these allegations on the record, but claimed that they could not be linked to any claim or invoice. The panel overlooked the paragraph on page 15 of the More Definite Statement which specifically links this letter to the referenced claims. The panel also overlooked Paragraphs 177-178 of the complaint which specifically link similar specific false representations to Lockheed's claim for $1.3 million. As further examples, Claims 1 through 9 in the More Definite Statement are specific claims linked to Paragraphs 223-224 of the complaint describing Lockheed's false representations concerning C2 security. The panel did not address Petitioner's allegations that these falsehoods rendered specific claims, such as those set forth in Claims 1 through 20 listed in the More Definite Statement, false by operation of the implied certification theory. In this respect, the panel decision directly conflicts with the Tenth Circuit's holding in *Shaw v. AAA Engineering & Drafting, Inc.*, 213 F.3d at 531-533.

Section I, Summary of the Third Amended Complaint, gave an overview of Lockheed's false claims scheme and Plaintiff's legal theory that claims presented to the government were false because of Lockheed's certification that it had complied with the material contractual requirements when Lockheed knew that it had not. The specific section of the complaint which alleged the false and fraudulent invoice for $1,300,000, which was part of the $2,584,926.04, is set out on pages 57-68 of the complaint. The Petitioner's legal theory regarding Lockheed's false implied

certifications of compliance that induced the VA's payment of the claim is set out on pages 91-94 of the complaint.

The court of appeals decision is of extraordinary importance because it materially affects the fundamental rights of future plaintiffs' access to the judicial process to protect the public fisc through False Claims Act litigation. By applying a "shotgun pleading" theory to this case, the court of appeals creates an unmanageable burden on plaintiffs to balance the tensions among Rules 8, 9 and 12 in False Claims Act cases. This is particularly true as fraud is classically sophisticated, subtle and complex, and further is often provable only by circumstantial evidence. Necessary inferences require a full exposition of all supporting facts.

B. The Decision Below Conflicts With The Holding Of This Court And Other Circuits Concerning The Full Scope Of The False Claims Act.

The panel decision defiantly disregards the repeated and recent precedents of this Court holding that the False Claims Act reaches all types of fraud. *See United States v. Neifert-White,* 390 U.S. 228 (1968), and *Cook County v. U.S. ex rel. Chandler,* 123 S. Ct. 1239 (2003). In *Cook County v. U.S. ex rel. Chandler,* the U.S. Supreme Court reaffirmed its holding in *United States v. Neifert-White Co.* as to the broad scope of the False Claims Act. As this Court held, in the False Claims Act, "Congress wrote expansively, meaning 'to reach all types of fraud without qualification that might result in financial loss to the government.'" *Cook County v. U.S. ex rel. Chandler,* 123 S. Ct at 1246, citing *United States v. Neifert-White Co.,* 390 U.S. at 232. As discussed herein, by ignoring these holdings and the clear statutory language, the appellate court abused its discretion by finding that Petitioner failed to state a cause of action under the False Claims Act. Quite the opposite, the appellate court questioned, thereby directly rejecting, the significance of procurement the ethics violations alleged as hybrid causes of

action for the wrongful presentment or payment of false or fraudulent claims that the government otherwise would not have approved or paid.

C. The Decision Below Conflicts With The Holding Of Other Circuits By Failing To Recognize The Doctrine Of Implied Certification Of The False Claims Act.

The decision below conflicts with the theory of implied certification of the False Claims Act. The Plaintiff's legal theory regarding Lockheed's false implied certifications of compliance that induced the VA's payment of the claim is set out in the complaint. The legal theory is the same basis for Lockheed's liability as approved by the Tenth Circuit in *Shaw, supra,* 213 F.3d at 531-533. The specific substantive Count 1 of the complaint charges Lockheed with all of the elements of a violation of 31 U.S.C. § 3729(a)(1).

III. The Writ Should Be Granted Because The Actions Of The Seventh Circuit Court Of Appeals Constituted Both Abuse Of Discretion And Clear Error And So Far Departed From The Accepted And Usual Course Of Judicial Proceedings And Has Sanctioned Such A Departure By The District Court As To Call For The Exercise Of This Court's Supervisory Power.

As specified herein, the dismissal of Petitioner's complaint is an abuse of discretion, in that it is an inappropriate application of controlling legal precedent and principles as established by this Court. Further, the dismissal is clear error, as it conflicts with the record before the Court. The opinions issued do not reflect minimally acceptable standards of judicial analysis and reasoning. Rather the lower courts failed to address all key issues concerning the adequacy of Petitioner's pleadings. In a departure

from expectations of a court, these opinions were vitriolic and derisive. The appellate court opinion in particular attempted to superficially discredit and dismiss the factual allegations presented to the court establishing liability under the False Claims Act.

A. The Lower Court's Opinion Is Clear Error As It Ignores The Record Before The Court.

As specified herein, the lower court committed clear error in finding that Petitioner had not and could not state a claim for relief on behalf of the public fisc under the False Claims Act. It could only seek to justify this finding by defiantly disregarding the clear precedents of this Court and statutory language reflecting the Congressional intent of the False Claims Act, as well as 18 U.S.C. § 207 and 31 U.S.C. § 1352. Petitioner pled the bases for Respondent Lockheed's liability with clarity, precision and a compelling specification of detail and supporting documentation. All of this was consistent with the classic principles of pleading established by this Court.

Petitioner's pleadings provided specific details of the fraudulent schemes that Respondent Lockheed, aided and abetted by Principi and other current and former VA officials, employed to obtain the $298 million from the VA and to get contract extensions which the VA otherwise would not have granted. Petitioner does not dispute that Federal Rule of Civil Procedure 9(b) applies to False Claims Act allegations of fraud. Conforming to the letter and the spirit of Rule 9(b), Petitioner described the "who, what, when and where" of the false claims in his Third Amended Complaint and More Definite Statement. Respondent argued to both the district court and the court of appeals that all the complaint alleged was breach of contract—demonstrating that the complaint gave Lockheed enough notice of the conduct it was accused of to fashion this defense. Respondents do not dispute that the VA did not get what it

bargained for, and it is undisputed that the VA paid out $298 million to Respondents. Respondents also do not dispute the hiring of Principi to lobby public officials. Respondents contend that, at the most, their failure to provide what they contracted for—and got paid for—is a routine breach of contract and thus not actionable under the False Claims Act. Respondent's formulation of this argument is *prima facie* evidence that Respondent understands the allegations in the complaint sufficiently well to fashion the breach of contract defense.

Petitioner's complaint also satisfies the requirements of Rule 8 by providing sufficient notice to Respondent. The court of appeals focused on the Rule 8(a) requirement that the complaint contain a short, plain statement of the allegations. Given the complexity, duration and volume of the transactions involved in Lockheed's scheme to defraud the VA through the Lockheed contract, the number of theories of liability under which Petitioner proceeded, and the requirement that Petitioner set out enough details to plead the fraud with particularity, insisting that the complaint be short overlooked the overarching requirement of Rule 8 that a complaint be construed to do simple justice between the parties. The decision below, which essentially ratified the district court's focus on the length of the complaint, conflicts with well settled law in the circuit interpreting these pleading rules. Additionally, it creates an impossible dilemma for relators who must provide enough detail and information to inform defendants of the accusations against them and yet not be too lengthy. If the appellate court decision is allowed to stand, plaintiffs and the courts must decide how long is too long. The Seventh Circuit has held that length is not a reason to dismiss a complaint.

Such clear error, particularly when concurrent with the abuse of discretion discussed herein, constitutes such a departure from the accepted and usual course of judicial proceedings as to require the intervention of this Court.

B. The Lower Court's Opinion Is An Abuse Of Discretion In Failing To Apply Appropriate Legal Standards.

The well settled precedents established by this Court set out a clear test for the sufficiency of a complaint. A complaint may not be dismissed unless it is clear that the complainant can prove no set of facts upon which relief may be granted. Instead of basing its decision on this Court's precedent, the court of appeals based its decision on its perceived need to safeguard the allocation of scarce judicial resources by conserving them for complaints it deemed "more deserving" than Petitioner's. Determining which pleading has more "merit" is a fundamental—and dangerous—subversion of the test for complaint sufficiency. This Court has a substantial stake in upholding interpretation of the federal pleading rules that allegations in a complaint are to be taken as true and inferences are to be drawn in favor of the pleader. By setting the bar much, much higher than this Court has held is appropriate, the court of appeals decision creates a standard which has the potential to discourage litigants from resorting to the courts to redress fraudulent practices. This Court cannot allow the court of appeals to turn litigants such as Petitioner away from the door to the courthouse. To do so is to seriously erode the public confidence in this nation as one governed by the rule of law.

Adopting a new theory, such as the "shotgun pleading theory" advanced in two Eleventh Circuit cases, will not achieve the substantial justice requirement of Rule 8(f). On the contrary, decisions which count paragraphs and pages and rely on esoteric theories of judicial analysis will impede the application of Rule 8, upon which the liberal pleading standard of federal court is based.

C. The Actions Of The Lower Courts Are Such A Departure From The Accepted And Usual Course Of Judicial Proceedings As To Require The Intervention Of This Court.

The opinion of the Seventh Circuit does not meet minimally acceptable standards of judicial conduct. As set forth above, it fails to appropriately apply the correct legal principles and ignores the plain record before the Court. One of the clearest examples set forth above is the affirmation of the dismissal of the Petitioner's conspiracy count without comment by either the district or appellate court. This occurred notwithstanding that this count fully complied in all respects with classic pleading requirements and prior instructions of the district court. The convergence of abuse of discretion and clear error has had a particularly severe effect in the context of this case which arises from the brutal and prolonged betrayal of public trust by cabinet level officers, other Presidential appointees and the nation's largest government contractor resulting in a loss of in excess of $150 million from the veterans and dependents Congress intended to benefit. This Court must act to bring Respondents' conduct within the reach of the law.

IV. The Writ Should Be Granted Because There Exists Today A Clear And Present Danger To The Public Fisc, Which Can Only Be Averted By Intervention Of This Court.

The two primary parties involved in the conspiracy which defrauded the public fisc of hundred of millions of dollars remain in power today. The former Acting Secretary of the Department at relevant times addressed in this suit is Anthony Principi, who sits today as the current Secretary of the Department of Veterans Affairs. He presides over one of the largest budgets within the Executive Branch. Lockheed Martin remains today the nation's largest government contractor. A refusal by this Court to

intervene will be viewed as a validation of a highly effective protocol for the piracy of public funds. The potential future consequences to the nation's financial well being are disastrous.

The concurrence of two such powerful influences as the involvement of a cabinet ranking official and the nation's largest contractor continue to have a chilling effect on the Government's ability to protect itself other than through the extraordinary private attorney general provisions provided through *qui tam* actions under the False Claims Act. Should this Court now decline to intervene, the likelihood of appropriate remedial action becomes extremely slim. The founding fathers, recognizing the vulnerability of the Executive and Legislative Branches to corrupt influences, created an independent Judiciary within its system of checks and balances. Similarly, Congress recognized that fraud against the nation and its public fisc was so prevalent and pernicious as to overwhelm any probable resources it might marshal. Accordingly, Congress established the private attorney general provisions embodied in the *qui tam* provisions of the False Claims Act. These provisions also were specifically targeted at providing protections to the nation and the public fisc, when the routine resources of the Executive Branch are overwhelmed. This statutory intent cannot be accomplished unless this Court intervenes and holds that the actions of the lower courts are unacceptable.

V. The Writ Should Be Granted To Protect And Preserve The Integrity Of The Country's Reputation For Commitment To Rule Under Law.

Unless this Court intervenes, there will be no consequence for the blatant and prolonged betrayal of public trust by a former cabinet level official, former Presidential appointees and the nation's largest government contractor. There will be an unavoidable tarnish to the nation's reputation as a country

committed to the rule of law where no one stands above the law. Our citizens and taxpayers deserve better.

The nation must not be embarrassed by a blatant demonstration that corruption involving Presidential appointees is an exception to America's commitment to equal justice under the law. During the Watergate scandal, the courage of this Court and Judge John Sirica in ordering the production of the Nixon tapes was recognized by the world as a reaffirmation of the integrity and greatness of the American system of government. *See United States v. Nixon*, 418 U.S. 683 (1974). The federal judiciary, as led by this Court, was widely acclaimed for confirming that in truth and in fact we are a nation where the rule of law prevails and that no one is above the law.

Americans were encouraged that, even though there were betrayals by individuals in high office, in the end the strength of the American system of government prevailed. The wisdom of the founding fathers in establishing the checks and balances of the three branches of government guided the nation to a just outcome. During that time of national crisis, the Judiciary preserved the faith of the American people in our system of government and the reputation of the country in the world community. Only intervention now by this Court can achieve the same outcome.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED MAY 8, 2003

In the
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 02-3175

UNITED STATES OF AMERICA BY AND THROUGH JOSEPH E. GARST,

Plaintiff-Appellant,

v.

LOCKHEED-MARTIN CORPORATION, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 98 C 5072—**John F. Grady,** *Judge.*

ARGUED APRIL 14, 2003—DECIDED MAY 8, 2003

Before CUDAHY, POSNER, and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* In 1990 the Department of Veterans Affairs chose Lockheed-Martin as the supplier of a new office automation system that was supposed to provide software, hardware, and services for database management and other services across a secure nationwide network. Lockheed performed under this contract between

1991 and 1997. Shortly after the VA replaced Lockheed with a different vendor, Joseph Garst, who used to work at the VA, filed this *qui tam* action on behalf of the United States. Garst alleged that Lockheed had violated the False Claims Act, 31 U.S.C. §§ 3729-33, by over-promising and under-performing, submitting fraudulent claims in the process. After reviewing Garst's allegations, the Department of Justice declined to take over the suit, leaving it in private hands.

Garst's complaint did not allege any specific fraud, leading Lockheed to move for its dismissal. (We use "Lockheed" as a collective description for all defendants, which include multiple corporate subsidiaries. Lockheed Martin Integrated Solutions Co., which performed the services under the contract, has been sold since 1997 to ACS State and Local Solutions, Inc., a subsidiary of Affiliated Computer Services, Inc., but Lockheed apparently retains all potential liability in this case.) Before the district court could act on Lockheed's motion, Garst filed an amended complaint. At 16 pages and 71 paragraphs, it was 50% longer than the initial complaint —but, the district judge concluded, no better. The court dismissed it for failure to plead fraud with particularity, 158 F. Supp. 2d 816 (N.D. Ill. 2001), a requirement that applies because the False Claims Act condemns fraud but not negligent errors or omissions. The district court observed that Garst had not given any specific example of a fraudulent claim. The judge permitted Garst to try again but reminded him of the need to allege "the who, what, when, where, and how: the first paragraph of any newspaper story." See *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990). The judge instructed Garst to file an organized and concise document.

Appendix A

Garst's second amended complaint ballooned to 74 double-spaced pages with 198 paragraphs. Concise it was not. Before Lockheed could respond, Garst filed a third amended complaint, which broke the scale at 109 pages containing 345 numbered paragraphs; this document had 74 attachments, many of them lengthy. Lockheed asked the district judge to dismiss this complaint for failure to plead fraud with particularity, as Fed. R. Civ. P. 9(b) requires, and for the omission of any "short and plain statement of the claim", as Fed. R. Civ. P. 8(a)(2) contemplates. These rules are not in conflict: it is possible to write a short statement narrating the *claim*—which is to say, the basic grievance—even if Rule 9(b) requires supplemental particulars. But the district judge concluded that this complaint is so sprawling as to be essentially incomprehensible (a Rule 8 problem) and that despite the bloat it lacks details outlining fraud (a Rule 9 shortcoming). Instead of dismissing this complaint, the judge directed Garst to file a more definite statement. To make sure that Garst knew exactly what was needed, the judge explained that the statement "should be brief and should as to each count: (1) identify *specific* false claims for payment or *specific* false statements made in order to obtain payment; (2) if a false statement is alleged, connect that statement to a specific claim for payment and state who made the statement to whom and when; and (3) briefly state why those claims or statements were false" (underlining in original). Garst responded with 23 single-spaced pages plus 25 new attachments. The statement is loaded with so many acronyms and cross-references to the third amended complaint (plus its attachments) that no one could understand it without juggling multiple documents. Concluding that matters had taken a turn for the worse, the district judge threw

up his hands and dismissed the complaint, with prejudice, for Garst's inability or unwillingness to conform his pleadings to Rules 8 and 9. 2002 U.S. Dist. LEXIS 14307 (N.D. Ill. July 31, 2002).

The third amended complaint and statement together equate to 155 double-spaced pages and more than 400 numbered paragraphs, plus 99 attachments. You'd think that all this paper and ink would be enough to narrate at least one false claim. Yet Garst's appellate brief does not extract from the pleadings a single instance of a false statement made to obtain payment. A few selections from the "more definite statement" show why, after four years of overseeing Garst's efforts to plead a claim, the district judge's patience ran out. Here is the first paragraph of the "more definite statement," right under the caption "SPECIFIC FALSE OR FRAUDULENT CLAIMS FOR PAYMENT (SFCFP)" (a caption that shows Garst's love of inscrutable acronyms):

> Claim for $2,584,926.04, MDS Ex. 1, TAC Ex. 47, submitted on August 9, 1993 and related payments by T.A. Sieverson, Vice-President of Lockheed Integrated Solutions Company, Lockheed Corporation to VA Contracting Officer Steve Stapleton for equipment and service provided during Phase I and Phase II of the OA& MM/ISMS LAN/WAN PROJECT. See TAC ¶¶ 141-181, 217-243, 252, 280-282, 291-295.

The acronyms alone force readers to look elsewhere. MDS means "More Definite Statement" and "TAC" means "Third Amended Complaint." LAN is local area network, WAN is

wide-area network, and PROJECT appears to be the word "project" masquerading as an acronym. What "OA&MM/ISMS" might mean, we have not endeavored to discover. It is not defined anywhere in the more definite statement. To understand the paragraph one would have to read two exhibits and *seventy-seven* paragraphs scattered throughout the third amended complaint! This is simplification? Yet still one would not learn (a) what Sieverson said, (b) why it is false, and (c) what OA&MM/ISMS stands for. Paragraph 21 of the "specific false claims" reads: "All Lockheed invoices and payments within the statute of limitations following Lockheed purchasing tickets in excess of one thousand dollars for VA presidential appointees and senior executives, as detailed in TAC ¶ 55-Ex 5 and 6." This is specific? How does "[a]ll Lockheed invoices and payments within the statute of limitations" zero in on the fraud? And, once again, what were the statements and why were they false? Garst reveals in his appellate brief that, in his view, any claim for payment implies that the vendor has not violated any ethical rules and that by lobbying the VA's top officials Lockheed committed such violations. Why ethical problems (if any) equate to fraudulent claims is hard to see; at all events, the pleading defect is that Garst has made it so hard to grasp his point.

The second section of the "more definite statement" begins with the caption "SPECIFIC FALSE STATEMENTS OR RECORDS MADE IN ORDER TO OBTAIN PAYMENT". The first paragraph in this section reads:

> The total claims for the OA&MM LAN/WAN are fraudulent or false because Lockheed's cost estimate given to the VA's Stapleton was false

> because, to obtain the project task order, Lockheed told the VA that it could accomplish the OA&MM LAN/WAN statement of work for $1.2 million, a savings of $700,000 over the previously selected Banyan VINES configuration. Lockheed billed the VA for at least $2.6 million and never delivered a working LAN/WAN that met the contract requirements. Lockheed submitted the false cost statement to the NOAVA Contracting Officer (Stapleton). TAC ¶ 141, Ex. 41.

"NOAVA" stands for "National Office Automation for Veterans Affairs." VINES expands to "Virtual Integrated Network Services" but used in this paragraph is the name of a competitor's product rather than an acronym for a family of network protocols. What "the OA&MM LAN/WAN statement of work" might be is a mystery; perhaps Garst meant to say "segment of work." A contention that the "total claims" are false again fails the requirement of specificity. What did Lockheed say? This time Garst at least hints at a falsehood: Lockheed promised to do a task for $1.2 million and eventually billed $2.6 million without meeting contract requirements. (Other parts of the complaint and statement suggest that the shortcoming that most concerns Garst is Lockheed's inability to make the network secure enough for the transmission of military secrets, though an outsider might suppose that a database of pensions and health benefits does not require quite that degree of sophisticated encryption.) Yet failing to keep one's promise is just breach of contract, and cost overruns in government procurement projects may occur without fraud. To satisfy Rule 9(b), Garst had to allege that Lockheed said something knowing at the time that the

representation was false (or not intending to perform); failures to satisfy the customer *ex post* are not fraud, for as Judge Friendly remarked there is no "fraud by hindsight." *Denny v. Barber*, 576 F.2d 465, 470 (2d Cir. 1978). See also *Murray v. Abt Associates Inc.*, 18 F.3d 1376 (7th Cir. 1994). The VA hired Lockheed to solve problems. That Lockheed knew in advance that there *were* problems (the most charitable description of Garst's allegations), some of which turned out to be insuperable (by Lockheed's staff, at least), does not come close to alleging fraud with particularity.

We could go on with other paragraphs of the complaint and statement, but there would be little point to the exercise. Some come closer to specific allegations of deceit but fail to link them to any claim for payment. (Lockheed says that it swallowed some of the costs, and did not submit bills, when it realized that certain objectives could not be achieved.) But even if it were possible to navigate through these papers to a few specific instances of fraud, why should the court be obliged to try? Rule 8(a) requires parties to make their pleadings straightforward, so that judges and adverse parties need not try to fish a gold coin from a bucket of mud. Federal judges have better things to do, and the substantial subsidy of litigation (court costs do not begin to cover the expense of the judiciary) should be targeted on those litigants who take the preliminary steps to assemble a comprehensible claim. Garst's lawyer filed documents so long, so disorganized, so laden with cross-references and baffling acronyms, that they could not alert either the district judge or the defendants to the principal contested matters.

Appendix A

Some complaints are windy but understandable. Surplusage can and should be ignored. Instead of insisting that the parties perfect their pleadings, a judge should bypass the dross and get on with the case. A district court is not "authorized to dismiss a complaint merely because it contains repetitious and irrelevant matter, a disposable husk around a core of proper pleading." *Davis v. Ruby Foods, Inc.*, 269 F.3d 818, 820 (7th Cir. 2001). But although "[f]at in a complaint can be ignored", *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998), "dismissal of a complaint on the ground that it is unintelligible is unexceptionable." *Davis*, 269 F.3d at 820. Length may make a complaint unintelligible, by scattering and concealing in a morass of irrelevancies the few allegations that matter. Three other circuits have held that length and complexity may doom a complaint by obfuscating the claim's essence. See *In re Westinghouse Securities Litigation*, 90 F.3d 696, 702-03 (3d Cir. 1996) (600 paragraphs spanning 240 pages); *Kuehl v. FDIC*, 8 F.3d 905, 908-09 (1st Cir. 1993) (358 paragraphs in "only" 43 pages); *Michaelis v. Nebraska State Bar Association*, 717 F.2d 437, 439 (8th Cir. 1983) (144 paragraphs in 98 pages). At 400 paragraphs covering 155 pages, and followed by 99 attachments, Garst's distended pleadings join that unsavory company. A concise statement of the claim illustrated by 400 concrete examples of fraud would be one thing, but 400 variations on the kind of paragraph we have quoted are quite another. Complaints like this are pestilential, and the district court showed great restraint in wading through four iterations plus one "more definite statement" before giving up. Garst received more judicial attention than his pleadings deserved.

Appendix A

AFFIRMED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED JULY 31, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 98 C 5072

UNITED STATES OF AMERICA ex rel. JOSEPH E. GARST,

Plaintiff,

v.

LOCKHEED-MARTIN CORPORATION, et al.,

Defendants.

MEMORANDUM OPINION

Before the court is defendants' motion to dismiss the third amended complaint. For the reasons explained below, the motion is granted.

BACKGROUND

Joseph Garst (the "relator") is a former employee of the United States Department of Veterans Affairs (the "VA") who initiated this *qui tam* action against the Lockheed-Martin Corporation and other Lockheed-related entities (collectively, "Lockheed") under the False Claims Act (the "FCA"),

31 U.S.C. § 3729. This action seeks to recover damages and civil penalties on behalf of the United States arising from purported false or fraudulent claims for payment presented to the VA.[1]

We fully outlined the basic facts of this case, as alleged by plaintiff and taken as true for purposes of this motion, in our memorandum opinion of March 29, 2001. *See United States ex rel. Garst v. Lockheed Integrated Solutions Co.*, 158 F. Supp. 2d 816 (N.D. Ill. 2001). In sum, in 1990, the VA issued a Request for Proposal for a nationwide office automatic system for the VA. The project was known as NOAVA, an acronym that stands for Nationwide Office Automation—Veterans Administration. The VA awarded the NOAVA contract to Lockheed Integrated Solutions, a wholly-owned subsidiary of the Lockheed-Martin Corporation. Plaintiff claims that Lockheed defrauded the VA in relation to the NOAVA contract.

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1. The FCA authorizes private individuals to file suit against any entity alleged to have presented a false or fraudulent claim for payment to the federal government. *See* 31 U.S.C. § 3730(b). After these private individuals, known as "relators" or "*qui tam* plaintiffs," file their complaints under seal, the government then has an opportunity to investigate and decide whether to intervene. If the government decides not to intervene, the complaint is unsealed and the suit proceeds. The relator is entitled to a share of the proceeds if the action is successful, the amount depending, in part, on whether the government intervenes. If the government joins the suit, the relator is eligible to receive between fifteen and twenty-five percent of the judgment. Here, the government elected not to intervene, so the relator is eligible to collect twenty-five to thirty percent of the proceeds if the action is successful. *See* § 3730(d)(1), (2).

Appendix B

The relator has filed three previous complaints. His third amended complaint (the "complaint") contains ten counts, all arising under the FCA. The relator claims that Lockheed presented false claims to the VA, used false statements to get such false claims paid, used false statements to conceal an obligation to repay money to the VA, and entered into a conspiracy to defraud the VA. In addition, the relator alleges that Lockheed violated the Ethics in Government Act, 18 U.S.C. § 207(a)(2) and (c), and the Byrd Amendment to the Procurement Integrity Legislation, 31 U.S.C. § 1352(a)(1) and (b)(1).[2] The complaint alleges that the United States suffered actual damages in excess of $150,000,000.

Defendants brought this motion to dismiss on the grounds that the complaint fails to plead fraud with particularity and fails to state a claim under the FCA. On May 8, 2002, we directed the relator to file a more definite statement because it appeared that the complaint failed to comply with Federal Rules of Civil Procedure 8 and 9. After the relator filed a more definite statement, defendants

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2. The Ethics in Government Act essentially prohibits former government officials now acting as lobbyists from attempting to improperly influence their former employers. 18 U.S.C. § 207.

The Byrd Amendment to the Procurement Integrity Legislation prohibits federal contract recipients from using federal funds to pay lobbyists to influence executive or legislative decision-making in connection with a specific federal contract. The Byrd Amendment also requires that persons receiving a federal contract file certain disclosures and certifications regarding lobbying. 31 U.S.C. § 1352.

supplemented their motion to dismiss, and the relator responded to the supplement.[3]

DISCUSSION

Because the FCA prohibits entities from presenting to the government "false or fraudulent claims" for payment, the relator must meet the heightened pleading requirement of Federal Rule of Civil Procedure 9(b) that the alleged fraud "be stated with particularity." *United States ex rel. Robinson v. Northrop Corp.*, 149 F.R.D. 142, 145 (N.D. Ill. 1993). This has been taken to mean that the "who, what, when, and where" of the fraud must be pleaded. *See id.*

"[T]he particularity demands of pleading fraud under Rule 9(b) in no way negate the commands of Rule 8." *Vicom, Inc. v. Harbridge Merchant Servs., Inc.*, 20 F.3d 771, 776 (7th Cir. 1994). Pursuant to Rule 8(a)(2), a complaint must set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8(e)(1) requires each averment of a pleading to be "simple, concise, and direct." Taken together, these two requirements "underscore the emphasis placed on clarity and brevity by the federal pleading rules." 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1217 (2d ed.1990). The primary purpose of these provisions is rooted in fair notice; a "complaint must be presented with intelligibility

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3. The relator's motion to strike certain matter from defendants' motion to dismiss is denied as moot because we need not consider (nor have we considered) the portion of the motion to which the relator objects.

sufficient for a court or opposing party to understand whether a valid claim is alleged and if so what it is." *Wade v. Hopper*, 993 F.2d 1246, 1249 (7th Cir. 1993) (citation omitted).

In our memorandum opinion of March 29, 2001, we dismissed the relator's first amended complaint for failure to plead fraud with particularity as required by Rule 9(b) and for failing to state an FCA claim. We cautioned that "[a]ny amended complaint should meet the pleading requirements explained in this opinion." 158 F. Supp. 2d at 825. Since then, the relator has amended his complaint two times. The third amended complaint not only suffers from many of the same defects as the prior complaints, it is so needlessly prolix and confusing that it fails to comply with Rule 8. We recognize that the facts may be complex, but "[t]he necessity for complexity . . . does not give litigants license to plead by means of obfuscation." *Jennings v. Emry*, 910 F.2d 1434, 1436 (7th Cir. 1990). The third amended complaint is 109 pages and contains 345 paragraphs. It is an example of "shotgun" pleading, meaning that "it is virtually impossible to know which allegations of fact are intended to support which claim(s) for relief." *Anderson v. District Bd. of Trustees*, 77 F.3d 364, 366 (11th Cir. 1996). "It goes without saying that a plaintiff with a solid case does not need to file a shotgun complaint." *Byrne v. Nezhat*, 261 F.3d 1075, 1130 n. 108 (11th Cir. 2001).

The relator had yet another opportunity to set forth his claims in an understandable manner when we directed him to file a more definite statement. We warned him of our belief that the third amended complaint failed to comply with Rules 8 and 9. We also specifically directed: "The [more definite]

statement should be *brief* and should, *as to each count*: (1) identify *specific* false claims for payment or *specific* false statements made in order to obtain payment; (2) if a false statement is alleged, connect that statement to a specific claim for payment and state who made the statement to whom and when; and (3) briefly state why those claims or statements were false." (Order of May 8, 2002) (emphasis in italics added).

The more definite statement is far from brief; it is 23 pages long and has 27 exhibits. By and large, it fails to connect allegedly false statements to specific claims for payment, and it does not state intelligibly *why* each particular claim or statement is false. As defendants point out, the relator offers reasons why he believes *all* of the listed claims are false, rather than explaining why each specific claim is false as he was directed to do. While we might be able to laboriously parse the more definite statement to identify a valid claim complying with our previous orders, we are not required to do so. *See Jennings*, 910 F.2d at 1436 (a complaint must be presented with intelligibility and clarity "sufficient to avoid requiring a district court or opposing party to forever sift through its pages in search of . . . understanding" "whether a valid claim is alleged and if so what it is."). Moreover, the relator's use of "incorporation by reference" with regard to certain counts does not comply with our order to identify which allegedly false statements pertain to which count of the complaint.

One of the relator's own exhibits—a chart containing "extracts" of his "preliminary draft summary exhibit, prepared in anticipation of trial" (Response to Defendants'

Supplement at 12 & Enc. 3)—demonstrates the difficulty of identifying a valid claim. The chart contains a list of purported false claims and corresponding columns titled "specific false statements," "reason why claim is false," "third amended complaint paragraph," "third amended complaint exhibit," and "more definite statement exhibit," which identify the location of the relator's allegations in the listed documents. Instead of assisting us, however, the chart (and even the need for a chart) confirms our belief that laborious parsing of the complaint would be necessary.

"Despite receiving express directions about what they had to do, counsel did not do it. At some point the train of opportunities ends." *Guaranty Nat'l Title Co. v. J.E.G. Assocs.*, 101 F.3d 57, 59 (7th Cir. 1996) (citation omitted). We cannot imagine attempting to try this case to a jury on the third amended complaint; it simply cannot serve as an orderly basis for litigation. This court has given the relator the benefit of the doubt by granting him numerous opportunities to file a complaint that complies with the Federal Rules of Civil Procedure. He has failed to do so, and there is no indication that he might be able to state a valid claim. Therefore, this dismissal will be with prejudice.

CONCLUSION

For the foregoing reasons, defendants' motion is granted, and the relator's third amended complaint is dismissed with prejudice. The relator's motion to strike matter from defendants' motion to dismiss is denied as moot.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS DATED MAY 8, 2002 AND FILED MAY 10, 2002

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Case Number 98 C 5072

U.S. ex rel. Joseph Garst

v.

Lockheed Integrated Solutions Co.

ORDER

Defendants have moved to dismiss plaintiff's third amended complaint. We have reviewed the 109-page third amended complaint, and we believe that the allegations are not simple, concise, or direct as required by Fed. R. Civ. P. 8(e)(1). We also believe that the third amended complaint fails to comply with Rule 9(b), which requires that all averments of fraud be stated with particularity. The separate, bare-bones counts alleged at the end of the third amended complaint are not connected with the factual allegations in a way that enables the court, or the defendants, to tell which allegations of fact are intended to support which claims for relief. Moreover, it appears that the third amended complaint suffers from many of the same defects as plaintiffs prior complaints, which we outlined in our memorandum opinion of March 26, 2001, granting defendant's motion to dismiss the amended complaint.

Appendix C

In lieu of dismissing the third amended complaint with prejudice and in the interest of expediting the resolution of this case, plaintiff is directed to file a more definite statement by May 29, 2002. *See* Fed. R. Civ. P. 12(e); *Anderson v. Board of Trustees*, 77 F.3d 364, 367 (11th Cir. 1996) (the court may require a more definite statement *sua sponte)*; 2 *Moore's Federal Practice* ¶ 12.36[1] (3d ed.1998) ("[C]ourts will occasionally order a more definite statement *sua sponte,* which they have the freedom to do."); *cf.* Fed. R. Civ. P. 16(c) (providing that the court may take appropriate action at pretrial conference with respect to the simplification of the issues). The statement should be brief and should, as to each count: (1) identify ecific false claims for payment or *specific* false statements made in order to obtain payment; (2) if a false statement is alleged, connect that statement to a specific claim for payment and state who made the statement to whom and when; and (3) briefly state why those claims or statements were false. As for the conspiracy allegations, plaintiff should specifically identify the alleged co-conspirators and describe the alleged agreement to defraud the government.

The court will consider defendants' motion to dismiss in light of plaintiffs more definite statement, and defendant is given leave to supplement its motion in light of the more definite statement, if it wishes, by June 12, 2002.

APPENDIX D — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MARCH 26, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 98 C 5072

UNITED STATES OF AMERICA ex rel. JOSEPH E. GARST,

Plaintiff,

v.

LOCKHEED INTEGRATED SOLUTIONS COMPANY,

Defendant.

MEMORANDUM OPINION

Before the court is defendant's motion to dismiss the plaintiff's amended complaint. For the reasons explained below, the motion is granted.

Background

Joseph Garst is a former employee of the United States Department of Veteran Affairs ("VA") who initiated this *qui tam* action against Lockheed Integrated Solutions Company ("Lockheed") under the False Claims Act ("FCA"). *See* 31 U.S.C. § 3729 (West Supp.2000). The action seeks to

recover damages and civil penalties on behalf of the United States arising from alleged false or fraudulent claims for payment presented to the VA.

The following facts are drawn from Garst's amended complaint ("complaint"), which we take as true for purposes of deciding this motion. In 1990, the VA issued a Request for Proposal ("RFP") for a nationwide office automation system for the VA. The project was known as "NOAVA," an acronym that stands for Nationwide Office Automation—Veterans Administration. The VA awarded the NOAVA contract to Lockheed, a wholly owned subsidiary of Lockheed Martin Corporation, in 1990. Lockheed hired a subcontractor known as SSDS, Inc.

The RFP required that the NOAVA system be compatible with certain computer systems the VA had already purchased, in particular, the Integrated Supply Management System ("ISMS"), its financial module, PRISM, and a network operating system known as Banyan VINES. It also required that the NOAVA system meet certain security guidelines. Under the contract, the VA was obligated to purchase equipment for the NOAVA contract from Lockheed alone.

According to the complaint, Lockheed made false representations to the VA in order to obtain the NOAVA contract and then failed to deliver on its promises. Lockheed failed to advise the VA that the individual it had identified as bearing primary responsibility for overseeing the NOAVA contract was no longer with the company; Lockheed falsely represented that its system would be compatible with Banyan VINES and would meet the VA's security requirements;

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Lockheed promised that its network operating system, PC-NFS, would work but it never did; Lockheed promised that its system would run ISMS and PRISM but the system was never able to do so in a manner that met the VA's needs; Lockheed represented that it would supply qualified data processing professionals to provide technical support, but supplied unqualified personnel; Lockheed promised to deliver "state of the art" computer hardware, but provided hardware that was behind the "state of the art"; Lockheed represented that it would provide hardware and software efficiently, but delivery was often very delayed and machines arrived without the necessary equipment to make them functional; Lockheed represented that it would pay liquidated damages when equipment was delivered late but never paid those damages; and Lockheed represented that it would provide hardware, software, and services at a competitive price but engaged in "rapacious pricing practices" which caused the VA to spend far more than the market price.

In 1993, Garst submitted a detailed memorandum to the Office of the Inspector General ("OIG") complaining of Lockheed's performance. The OIG conducted an audit of the NOAVA contract and issued a report in September of 1994, finding that the VA did not maintain records adequate to enable oversight of Lockheed's performance of the NOAVA contract or of Lockheed's pricing practices. The OIG report found that about three million dollars was paid to Lockheed in late payment penalties, in part due to deficiencies in Lockheed's billing practices. In addition, the OIG report found that the VA's contracting officer was not authorized to commit the VA to the large expenditures under the NOAVA contract.

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Thereafter, Garst and others who complained about the "fraudulent aspects of the Lockheed NOAVA contract" suffered reprisals and were "removed from the communication loop concerning the NOAVA contract." Garst himself was forced out of the VA after he complained.

In 1998, Garst filed this complaint under the *qui tam* provision of the False Claims Act ("FCA"), which authorizes private individuals to file suit against any entity alleged to have presented a false or fraudulent claim for payment to the federal government. *See* 31 U.S.C. § 3730(b). After these private individuals, known as "relators" or *"qui tam* plaintiffs," file their complaints under seal, the government then has an opportunity to investigate and decide whether to intervene. 31 U.S.C. § 3730(b)(2). If the government decides not to intervene, the complaint is unsealed and the suit proceeds. The relator is entitled to a share of the proceeds if the action is successful, the amount depending, in part, on whether or not the government intervenes. 3730(b)(1), (d)(1) (if the government joins the suit the relator is eligible to receive between fifteen and twenty-five percent of the judgment). Here, the government elected not to intervene, so the relator is eligible to collect thirty to thirty-five percent of the proceeds if the action is successful.

The defendant brings this motion to dismiss on the grounds that: (1) the relator has not pled fraud with particularity; (2) he has not stated a claim under the False Claims Act; (3) and the six year statute of limitations on the only bill presented (June of 1992) ran before the complaint was filed in August of 1998.

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Analysis

A. *Count I: Violations of § 3729(a)(1), (2), and (7).*

Because the FCA prohibits entities from presenting "false or fraudulent claims" for payment to the government, the relator must meet the heightened pleading requirement of Federal Rule of Civil Procedure 9(b) that the alleged fraud "be stated with particularity." *United States ex rel. Robinson v. Northrop Corp.*, 149 F.R.D. 142, 145 (N.D.Ill.1993). This has been taken to mean that the plaintiff must plead the "who, what, when, and where" of the fraud. *Id.*

Lockheed argues that the complaint fails to provide sufficient information to allow Lockheed to defend itself. For example, the complaint fails to identify what part of § 3729 the defendant violated and further fails to specify any claims for payment that Lockheed presented which were false or fraudulent. Moreover, Lockheed points out that the relator has failed to allege fraud with any particularity: the plaintiff has not identified any individuals who committed fraud, provided any specific dates, nor stated where the alleged fraud occurred.

In his Response, the relator does not identify the specific provisions of § 3729 that Lockheed allegedly violated, nor does he point to any particular false claims. The relator simply restates some of the general allegations in his complaint, relying primarily on his general claim that Lockheed induced the VA to enter into a $298 million contract with false promises about the quality of its equipment and technical expertise. As to Lockheed's argument that he has not pled

fraud with particularity, the relator responds that he cannot be expected to supply information that is within Lockheed's control, and that the requirements of Rule 9(b) should be somewhat relaxed in this case because of the ten year duration of the contract.

Because the relator does not dispute Lockheed's conclusion that he only intended to state claims for alleged violations of 31 U.S.C. § 3729(a)(1), (2), and (7) in Count I, we will analyze liability only under these subsections.

1. *§ 3729(a)(1) and (2)*

Under subsections (1) and (2), the relator must allege that the defendant knowingly presented a false claim for payment to the government, or that it presented a false statement or record in order to obtain payment. *See United States ex rel. Bustamante v. United Way/Crusade of Mercy, Inc.*, No. 98 C 5551, 2000 Westlaw 690250, at *4 (N.D. Ill. May 25, 2000) (setting forth the elements of § 3729(1) and (2) separately). Moreover,

> "[K]nowingly" means the person (or entity): (1) had actual knowledge of the falsity of the information at issue; (2) acted in deliberate ignorance of the truth or falsity of that information; or (3) acted in reckless disregard of the truth or falsity of the information. 31 U.S.C. § 3729(b). Innocent mistakes or negligence are not actionable under this section. [Citations omitted]. . . . In short, the claim must be a lie.

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Hindo v. University of Health Sciences, 65 F.3d 608, 613 (7th Cir.1995).

The defendant is correct that no specific false or fraudulent claims or records have been alleged. Only one claim for payment was alleged at all—a claim for $26,000 for 430 hours of work done to install Lockheed's network. But there is no allegation that the 430 hours of work billed was not actually done. *see id.* (finding that a claim was not fraudulent where there was no contention the work was not done), or that Lockheed knowingly misrepresented to the VA that its installation had been successful. *Cf. U.S. v. Hydroaire, Inc.*, No. 94 C 4414, 1995 WL 86733, at *4-5 (N.D. Ill. Feb. 27, 1995) (fraud was sufficiently alleged where the complaint stated that the defendant had certified that its product met the requirements of the contract and requested payment, but in fact the defendant knew the product was deficient).

The relator has cited no case for the proposition that he need not identify the false claims or records specifically, nor does he address the Seventh Circuit case cited by Lockheed, *Midwest Grinding Co., Inc. v. Spitz*, which held that dismissal of a fraud claim was proper where the plaintiff failed to identify the specific dates on which the defendant allegedly sent false invoices. 976 F.2d 1016, 1020 (7th Cir.1992).

Reading the complaint (together with his Response) in the light most favorable to the relator, his claim is that Lockheed induced the VA to enter into the $298 million contract by making numerous false promises on which it failed to deliver. Relator apparently believes it is unnecessary to allege the individual false claims or records because the

general allegations of overpricing for goods and services, assigning unqualified personnel to provide technical support, selling computers with a high failure rate, and designing a system which failed to meet the VA's needs, are sufficiently specific.

This sort of argument may apply in circumstances where the complaint alleges a very specific kind of false statement that appeared on every invoice submitted. *See United States ex rel. Johnson v. Shell*, 183 F.R.D. 204 (E.D. Tex.1998) (holding that the relators did not have to specify invoice numbers and dates where they alleged that each and every monthly royalty report was false in the same respect). Here, however, the relator attempts to allege various kinds of fraud occurring over a period of ten years. Further, it does not appear from the complaint that all the invoices submitted to the VA over the ten year duration of the contract were false or fraudulent. *See* Compl. ¶ 64 (referring to the "fraudulent aspects of the Lockheed NOAVA contract"). In such circumstances, it is appropriate to require that the relator describe the claims or records specifically and allege wherein they were false. *See United States ex rel. Clausen v. Laboratory of Am., Inc.*, 198 F.R.D. 560, 564 (N.D.Ga.2000) (dismissing FCA claim where the relator failed to allege any false claims or the dates on which they were submitted, and citing cases dismissing on the same grounds). In *Clausen*, a case where the relator alleged that the defendant performed unnecessary tests, the court observed that:

> [i]n essence, the Amended Complaint does not identify any specific claims that were submitted to the United States or identify the dates on which

> those claims were presented to the government. Instead, Plaintiff relies exclusively on conclusory allegations of fraudulent billing. Although Plaintiff's description of the fraudulent schemes in which Defendant allegedly engaged is set out in specific detail, performing these tests is not a violation of the FCA. Defendant could perform as many tests as it pleased as long as it only billed for the ones allowable under the applicable governmental program. Therefore, the fact that Defendant engaged in fraudulent testing, without sufficient allegations regarding the billing for these tests, does not allege a fraud claim with sufficient particularity according to Rule 9(b).

Id. at 564 (citing *U.S. ex rel. Hopper v. Anton*, 91 F.3d 1261, 1265-66 (9th Cir.1996) which held that "the Act attaches liability, not to the underlying fraudulent activity, but to the 'claim for payment.' "). The alleged fraud in *Clausen* took place over a ten year period of time, as it did here. "It is hard to imagine how Defendant can respond to an allegation that fraud was committed over a ten year period" without knowing the time that some of the false claims were submitted, much less what the false claims actually were. *Id.*

The relator cannot escape this conclusion simply by arguing that the specifics are "uniquely" within Lockheed's control. Response at 7. Any claims for payment were sent to the VA; Lockheed does not have exclusive possession of the claims or records presented. Any argument that the pleading standards should be lessened for *qui tam* plaintiffs because they do not necessarily have access to government records

has been rejected. *See Robinson*, 149 F.R.D. at 145 ("To apply a more lenient standard merely because the plaintiff was not the victim of the fraud and/or did not have access to all the facts, would be unfair to a defendant who may have to answer a complaint that would not be acceptable if the government had intervened in the action.").

Apart from the failure to plead any specific invoices, the relator's allegations fall well short because he has only alleged a laundry list of problems that Lockheed had in performing the contract. He has not alleged facts that would support an inference of fraudulent—rather than negligent—conduct on the part of Lockheed. The case of *U.S. v. Hydroaire, Inc.*, 1995 WL 86733, at *4-5, offers an instructive comparison. In that case, the government based its FCA action on the claim that defendant Hydroaire failed to deliver certain metallurgically bonded cylinders for use in Trident submarines as it had promised to do under the contract. The defendants made a motion to dismiss on the ground that the government did not plead fraud with particularity. Holding the complaint sufficient, the court observed that it alleged that (1) the contract entailed specific qualifications for the materials requested; (2) the defendant, Hydroaire, hired a company to produce the cylinders knowing that the company did not have the ability to produce the bond required under the contract; (3) Hydroaire was notified by a third party that the cylinders, in fact, did not meet the bond specifications required under the contract; and (4) at five different times, Hydroaire nevertheless presented a certificate stating its cylinders were in compliance with the contract and requested payment for them. *Id.* at *4. The complaint further stated the time frame in which Hydroaire was notified that the cylinders

did not comply with the contract (within a four-month window), and the specific dates on which a certificate of compliance was presented and the amount of payment requested. *Id.* at *4-5.

In comparison, the complaint here is bare. There is only one set of facts that even approaches the level of concreteness in *Hydroaire*, but even these facts are too sparse to sustain an FCA claim. The complaint alleges that the RFP required the contractor to deliver a system that would provide "C2" level security to protect sensitive proprietary and personal information, but an employee of Lockheed's subcontractor, SSDS, stated that "the most that Lockheed and SSDS were prepared to provide was security 'in the spirit of C2.' " Compl. at ¶ 51, 52. Nevertheless, Lockheed falsely represented to the VA that the system fully met its security requirements. *Id.* at ¶ 50. Unlike the complaint in *Hydroaire*, the complaint here fails to identify the SSDS employee, when or where the conversation with the SSDS employee occurred, when and where Lockheed's alleged misrepresentation occurred and who made it. *See also Robinson*, 149 F.R.D. at 146 (finding that plaintiff's allegations failed to provide supporting facts on which the allegation of fraud was founded where he failed to identify an employee specifically). More fundamentally, the complaint does not even state whether Lockheed ever requested payment on the basis of this false assertion, and if so, when.

There are no other allegations that Lockheed knowingly presented defective goods or services to the VA and attempted to pass them off as meeting the RFP requirements. Instead, the remaining allegations boil down to claims that Lockheed

failed to meet the terms of the contract. For example, the relator claims that Lockheed charged excessive prices for the goods and services it provided. But according to the complaint, the contract itself required the VA to purchase items from Lockheed "even when those products and services were priced substantially higher than the same or functionally equivalent items cost in the marketplace." Compl. ¶ 61 (complaining that Lockheed insisted on this contract). The only potential allegation of fraud is one that claims Lockheed often failed to provide the technical support for which the VA paid higher hardware and software prices. *Id.* at ¶¶ 47, 49. But unaccompanied by any particulars (such as invoice dates, times when service was refused, etc.) and absent any facts suggesting that Lockheed *knew* it could not or would not provide technical support, this allegation amounts to negligence or breach of contract, not a violation of the FCA. *See Hindo*, 65 F.3d at 613 (noting that knowledge is required under the FCA and that mistake or negligence is not enough); *see also Hopper*, 91 F.3d at 1265 (agreeing with the district court's analysis that "[i]t is not the case that any breach of contract . . . automatically gives rise to a claim under the FCA. . . . The FCA is far narrower. It requires a false claim.").

Because the complaint alleges no facts from which it appears that Lockheed requested payment or submitted records for payment of claims it knew[1] were false, we dismiss the claims that defendant violated section 3729(a)(1) and (2).

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1. According to paragraph 29 of the complaint, Lockheed and the VA negotiated a settlement as a result of Lockheed's failure to deliver a system that was compatible with the VA's ISMS project. Compl. ¶ 29. This tends to suggest that Lockheed acknowledged its failures under the contract.

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2. *§ 3729(a)(7)*

The relator's claim that Lockheed violated section 3729(a)(7) must fail for the same reasons. This section makes it unlawful for anyone to "knowingly make [ ], use[ ], or cause[ ] to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government."

The complaint alleges that Lockheed did not pay liquidated damages for late deliveries of hardware and software even though it had agreed to do so. Compl. at ¶¶ 36, 37, and 40. This is insufficient because there is no allegation that Lockheed avoided its obligation by lying to the VA. Indeed, the relator's Response brief shifts responsibility for this from Lockheed to the VA: "There is no indication of the VA charging Lockheed anything for its chronically late shipments to the VA, despite contract provisions that allowed the VA to do so." Response at 4.

The relator also argues that his complaint "alleges that Lockheed's misrepresentations and conspiracy prevented the government from obtaining default damages to which the VA was entitled." Response at 11. We find no allegation in the complaint that the VA was entitled to default damages or that Lockheed submitted records or statements to prevent these damages from being assessed.

Therefore, we dismiss the claim under § 3729(a)(7).

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B. *Count II*: *Conspiracy*

The relator claims that Lockheed violated § 3729(a)(3), which prohibits "conspir[ing] to defraud the Government by getting a false or fraudulent claim allowed or paid." The defendant argues that the relator's claim must fail because the complaint fails to identify any co-conspirator or any agreement to defraud, and therefore, Lockheed cannot draft a response. *See United States ex rel. Durcholz v. FKW Inc.*, 997 F. Supp. 1143, 1158 (S.D. Ind. 1998) ("An agreement among two or more person[s] is the essence of conspiracy.").

The relator responds that because conspiracies are secret by their very nature, he need only allege circumstances which support the inference that Lockheed conspired with others to defraud the government. He paraphrases a number of allegations in his complaint which criticize the VA's dealings with Lockheed,[2] and states that this "laundry list of instances

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2. The relator alleges the following facts are sufficient circumstantial evidence of fraud:

1) the VA entered into a mandatory purchase contract with Lockheed in the early to mid-1990s, a time when vendors were vigorously competing for business;

2) Lockheed was allowed to charge more than double the going rate for hardware at a time when prices were plummeting as technology advanced;

3) Lockheed was allowed to deliver older generation equipment even though it had promised state of the art wares;

(Cont'd)

in which Lockheed was given a pass go far beyond causal [sic] contracting practices and lead to the common sense conclusion that Lockheed entered into an agreement with one or more parties to defraud the VA in the NOAVA contract." However, these allegations are not obviously indicative of a conspiracy to defraud; they are as consistent with simple negligence on the part of the VA administrators as they are with the hypothesis of fraud.

(Cont'd)

4) Lockheed was given many more than the allowed number of chances to test its network solutions;

5) Lockheed was not held to the requirement that it provide C-2 level security;

6) Lockheed was never assessed liquidated damages when it missed delivery dates, even though the contract called for such damages;

7) Lockheed was not charged with default, even though it never delivered the integrated systems it promised;

8) the VA did not question the gap between the expertise Lockheed promised and the lack of knowledge of the personnel Lockheed actually put on the job;

9) this $298 million contract was administered by a contracting officer without the proper warrant;

10) Lockheed was not penalized for shipping hardware that didn't work instead of computers that Lockheed promised would be "many of the top-selling products in the marketplace." Response at 13-14.

Moreover, these allegations leave us to speculate at who was involved in this supposed conspiracy—does the relator mean to suggest that employees of the VA conspired with Lockheed to defraud the VA? There is only one VA employee mentioned by name—William Stapleton, the officer who oversaw the contract and who allegedly exceeded his authority in making payments to Lockheed. Compl. ¶ 59. Other allegations suggest that several upper-level employees of the VA took part in the supposed conspiracy. For example, the relator alleges that the VA took reprisals against individuals who complained about Lockheed's performance of the NOAVA contract, and that it also removed those employees from "the communications loop" about the NOAVA contract. Compl. ¶ 64. These and other general complaints about the behavior of unidentified VA personnel are insufficient to add up to conspiracy, particularly when the relator has not alleged any agreement or named parties to the agreement.

Next the relator argues that SSDS conspired with Lockheed to defraud the VA. However, there is no allegation in the complaint that SSDS was a co-conspirator, or that SSDS and Lockheed had any agreement to defraud the VA. The only allegation that might support an inference of fraud is that SSDS knew that it and Lockheed could not provide level C2 security that Lockheed had promised. However, the conspiracy must be one to "get a false or fraudulent claim allowed or paid" by the government, and as pointed out previously, there is no allegation that Lockheed or SSDS ever presented or attempted to present a claim for payment based on an assertion that they had delivered level C2 security.

Therefore, we dismiss the relator's conspiracy claim under § 3729(a)(3).

CONCLUSION

For the reasons stated above, the relator's complaint is dismissed without prejudice. We grant the relator leave to file an amended complaint by April 27, 2001. Any amended complaint should meet the pleading requirements explained in this opinion.

DATE: March 26, 2001

ENTER: s/ John F. Grady
John F. Grady, United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED JUNE 2, 2003

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 2, 2003

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

UNITED STATES OF AMERICA BY AND THROUGH JOSEPH E. GARST,

Plaintiff-Appellant,

No. 02-3175 **v.**

LOCKHEED-MARTIN CORPORATION, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.

No. 98 C 5072
John F. Grady, *Judge*.

Appendix E

Order

Plaintiff-appellant filed a petition for rehearing and rehearing en banc on May 22, 2003. No judge in regular active service has requested a vote on the petition for rehearing en banc,* and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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* Chief Judge Flaum did not participate in consideration of this matter.

APPENDIX F — STATUTES INVOLVED

31 U.S.C.A. § 3729

Sec. 3729. False claims

(a) Liability for certain acts.—Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action,

or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined.—For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

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(c) CLAIM DEFINED.—For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

* * * *

31 U.S.C.A. § 1352

Sec. 1352.—Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions

(a)(1) None of the funds appropriated by any Act may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any Federal action described in paragraph (2) of this subsection.

(2) The prohibition in paragraph (1) of this subsection applies with respect to the following Federal actions:

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(A) The awarding of any Federal contract.

(B) The making of any Federal grant.

(C) The making of any Federal loan.

(D) The entering into of any cooperative agreement.

(E) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b)(1) Each person who requests or receives a Federal contract, grant, loan, or cooperative agreement from an agency or requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency, in accordance with paragraph (4) of this subsection—

(A) a written declaration described in paragraph (2) or (3) of this subsection, as the case may be; and

(B) copies of all declarations received by such person under paragraph (5).

(2) A declaration filed by a person pursuant to paragraph (1)(A) of this subsection in connection with a Federal contract, grant, loan, or cooperative agreement shall contain—

(A) the name of any registrant under the Lobbying Disclosure Act of 1995 who has made lobbying contacts on behalf of the person with respect to that Federal contract, grant, loan, or cooperative agreement; and

(B) a certification that the person making the declaration has not made, and will not make, any payment prohibited by subsection (a).

(3) A declaration filed by a person pursuant to paragraph (1)(A) of this subsection in connection with a commitment providing for the United States to insure or guarantee a loan shall contain the name of any registrant under the Lobbying Disclosure Act of 1995 who has made lobbying contacts on behalf of the person in connection with that loan insurance or guarantee.

(C) a request for or receipt of a loan, or a commitment providing for the United States to insure or guarantee a loan, that does not exceed $150,000, or the single family maximum mortgage limit for affected programs, whichever is greater, including a contract or subcontract to carry out any purpose for which such a loan is made.

(e) The Secretary of Defense may exempt a Federal action described in subsection (a)(2) from the prohibition in subsection (a)(1) whenever the Secretary determines, in writing, that such an

exemption is in the national interest. The Secretary shall transmit a copy of each such written exemption to Congress immediately after making such determination.

(f) The head of each Federal agency shall take such actions as are necessary to ensure that the provisions of this section are vigorously implemented and enforced in such agency.

(g) As used in this section:

* * *

(6)**(A)** The terms "Federal contract", "Federal grant", "Federal cooperative agreement" mean, respectively—

(1) a contract awarded by an agency;

* * * *

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18 U.S.C.A. § 207

Sec. 207.—Restrictions on former officers, employees, and elected officials of the executive and legislative branches

(a) Restrictions on All Officers and Employees of the Executive Branch and Certain Other Agencies.—

(1) Permanent restrictions on representation on particular matters.—

Any person who is an officer or employee (including any special Government employee) of the executive branch of the United States (including any independent agency of the United States), or of the District of Columbia, and who, after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia) in connection with a particular matter—

(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,

(B) in which the person participated personally and substantially as such officer or employee, and

(C) which involved a specific party or specific parties at the time of such participation,

shall be punished as provided in section 216 of this title.

(2) Two-year restrictions concerning particular matters under official responsibility.—

Any person subject to the restrictions contained in paragraph (1) who, within 2 years after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia), in connection with a particular matter—

(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,

(B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment with the United States or the District of Columbia, and

(C) which involved a specific party or specific parties at the time it was so pending,

shall be punished as provided in section 216 of this title.

* * *

(c) One-Year Restrictions on Certain Senior Personnel of the Executive Branch and Independent Agencies.—

(1) Restrictions.—

In addition to the restrictions set forth in subsections (a) and (b), any person who is an officer or employee (including any special Government employee) of the executive branch of the United States (including an independent agency), who is referred to in paragraph (2), and who, within 1 year after the termination of his or her service or employment as such officer or employee, knowingly makes, with the intent

to influence, any communication to or appearance before any officer or employee of the department or agency in which such person served within 1 year before such termination, on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of such department or agency, shall be punished as provided in section 216 of this title.

(2) Persons to whom restrictions apply.—

(A) Paragraph (1) shall apply to a person (other than a person subject to the restrictions of subsection (d))—

(i) employed at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5,

(ii) employed in a position which is not referred to in clause (i) and for which the basic rate of pay, exclusive of any locality-based pay adjustment under section 5302 of title 5 (or any comparable adjustment pursuant to interim authority of the President), is equal to or greater than the rate of basic pay payable for level 5 of the Senior Executive Service,

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(iii) appointed by the President to a position under section 105(a)(2)(B) of title 3 or by the Vice President to a position under section 106(a)(1)(B) of title 3, or

* * * *

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No. 03-382

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA BY AND THROUGH JOSEPH E. GARST,

Petitioner,

v.

LOCKHEED-MARTIN CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner respectfully requests rehearing of his Petition for Writ of Certiorari. He bases his request upon information released on November 6, 2003. Specifically, the Department of Veterans Affairs, headed again by Secretary Anthony Principi, has selected Lockheed Martin Corporation to lead an eight-year Global Information Technology Support Services Program projected to generate $3.1 billion in revenues.

Shortly after this Court entered an order denying the Petition for the Writ of Certiorari on October 20, 2003, the Department of Veterans Affairs and Lockheed Martin Corporation (hereinafter "Lockheed Martin") announced that the Department ha selected Lockheed Martin for the Department's Global Information Technology Support Services program. This program will be managed by the Department of Veteran Affairs acquisition center in Austin, Texas. The announced purpose of this program is to provide information technology and telecommunication products and services to all federal agencies through the Department of Veterans Affairs Global Information Technology Support Services Program.

The contractual relationship announced on November 6 is remarkably and dangerously similar to the National Office Automation, Veterans Affairs contract that in 1992 formed the gravamen of Petitioner's underlying complaint. Both contracts are indefinite delivery, indefinite quantity contracts projected to extend over a period of years. Both contracts call for substantial expenditures from the public fisc for agency-wide information technology products and services. Both contracts contain requirements for, *inter alia*, systems integration, information security and software development.

The new program has a revenue potential of $3 billion, while the National Office Automation, Veterans Affairs contract was budgeted merely at $300 million. Both were awarded while Anthony Principi was either the Secretary or the Deputy Secretary of the Department. Given the alarming similarities between the two contracts, it is reasonable to assume that the Global Information Technology Support Services Program, like its NOAVA predecessor, will be made to be at least *de facto* administratively mandatory to achieve standard policies such as uniformity.

The announcement of this new acquisition program between the Department of Veterans Affairs and Lockheed Martin Corporation represents substantial grounds for rehearing not previously presented to this Court. Further, the announcement underscores the importance of two of the reasons advanced by Petitioner for granting a writ of certiorari. These were the clear and present danger to the fisc and the importance of protecting the nation's reputation for commitment to the rule of law and preserving the integrity of government operations.

A. The Department of Veterans Affairs Global Information Technology Support Systems Program involving Lockheed Martin substantially strengthens and supports Petitioner's rationale to the Court that a writ should be granted to avert a clear and present danger to the public fisc.

As Petitioner warned, Lockheed Martin and Anthony Principi have interpreted the denial of a writ of certiorari as a ratification and validation of their perfected scheme for raiding the public fisc. They obviously feel free to implement a new contractual vehicle, which will allow them to harvest

a substantial portion of the projected $3 billion in program revenues over the next eight years in a scenario perilously similar to the one addressed in Petitioner's complaint.

Within eight years, Anthony Principi is highly likely to leave the cabinet position of Secretary of the Department of Veterans Affairs. It is also entirely possible that he will return to Lockheed Martin Corporation or one of its affiliates or subsidiaries. What is to stop him from taking control of this new Global Information Technology Support Services Program as a private sector official? If he does, he would presumably be too careful to leave the type of documentation obtained during the underlying litigation. It is unlikely that this time he or Lockheed Martin will leave time and expense receipts (Ex.11, Third Amended Complaint) for "luncheon with VA official" or "lobbying public officials" during the statutorily prohibited periods. It is highly unlikely that this time he will document concealment efforts such as his direction to a Lockheed public relations official quoted below (presented in Ex. 13, Third Amended Complaint):

> To: Ron Jury
>
> From: Anthony Principi
>
> Date: May 17, 1995
>
> Subj: Press Release
>
> RON, I HOPE YOU WON'T MIND MY MAKING A FEW CHANGES TO THE PRESS RELEASE IN VIEW OF THE SENSITIVITY AT THE VA, AND GOVERNMENT IN GENERAL REGARDING FORMER PUBLIC OFFICIALS AND ONGOING CONTRACTS. I THOUGHT IT BEST NOT TO HIGHLIGHT OUR NOAVA CONTRACT WITH MY FORMER DEPART-

> MENT ESPECIALLY AT THIS TIME. WE ARE HOPING TO OBTAIN AN INCREASE IN CONTRACT FUNDING AND THE PRESS WOULD FEED ON THE TIMING OF MY APPOINTMENT. AFTER DELETING THE NOAVA PORTIONS OF THE RELEASE A FEW OTHER CHANGES FELL INTO PLACE.
>
> I HOPE MY TITLE IS CEO AS THAT'S WHAT I WAS TOLD AND THE UNDERSTANDING WITHIN LISC AND AT THE VA.

This time around, if there is a violation or even a series of violations involving present and payment of false claims, concealments, misrepresentations or even bribes or death threats, what is the likelihood, given the disposition of this case, that any Government employee, contract agent, Inspector General, Assistant U.S. Attorney or other Department of Justice attorney would take action? Who among them would believe that the relevant provisions of Titles 18 or 31 of the United States Code will be enforced by the courts when Lockheed Martin Corporation and a cabinet level official are involved?

Even the fail-safe provision established by Congress in the *qui tam* provisions of the False Claims Act will have little deterrent value. Petitioner's attorneys invested over five years and hundreds of thousands of dollars to bring the specific and particular information of presentment and payment of false claims, corruption and defalcation used to defraud the nation's fisc within the jurisdiction and attention of the judicial system. For example, while the former contract addressed in Petitioner's complaint required each claim that was presented by Lockheed Martin to be a guarantee that each item billed to the Government met all material

requirements of the contract, Lockheed Martin's claims were paid by the Department of Veterans Affairs for computer systems that did not meet many of the material contract requirements and many systems never became operational. Further, Lockheed Martin double billed for items its contract had included in the purchase price. Unless the Court grants the writ of certiorari, it is highly unlikely that any other set of plaintiff's attorneys will be willing to make a similar investment under like circumstances.

In the event that this Court declines to rehear and reconsider granting the writ of certiorari, those who have made and received payment for false claims and who have used deceit, concealment, corruption and death threat to obtain public funds they would not otherwise have received will triumph. Their victory will extend not only to the millions that they have stolen, but also to the billions that they may potentially steal in the future. The Department of Veterans Affairs Global Information Technology Support Services contract is the very real, clear, present and dangerous vehicle to accomplish that end.

B. The new contract involving Lockheed Martin substantially strengthens and supports Petitioner's rationale to the Court that a writ should be granted to protect the nation's reputation for commitment to the rule of law and to preserve the integrity of the nation's system of government.

The awarding of the Veterans Affairs Global Information Technology Support Services Program provides new substantial grounds supporting the importance of protecting the nation's commitment to the rule of law and the integrity of our system of government.

Our leaders and recognized economic experts have recognized that freedom from corruption in government and the rule of law are two essential elements for a viable nation and economy.

As reported in the October 31, 2003 edition of the *Chicago Sun Times*, noted British economist Niall Ferguson, delivering the first Richard J. Franke Lecture on October 30, 2003 at the Newberry Library in Chicago, discussed the crucial benefits of two successive centuries of British and American influence on the world. "These include the assurance of security and free markets for both the homeland and the territories," "And most crucially, it fosters rule of law and the creation of non-corrupt administration — conditions that, more than anything, are sources of economic development."

As this Court evaluates the importance of granting a writ of certiorari in light of the new successor Information Technology contractual relationship between the Department of Veterans Affairs (again under the cabinet level leadership of Anthony Principi) and Lockheed Martin Corporation, Petitioner respectfully directs the Court's attention to the remarks of President John F. Kennedy in the Radio and Television Report to the Nation on the Situation at the University of Mississippi, September 30, 1962. President Kennedy stated, in pertinent part:

> The orders of the court in the case of Meredith v. Fair are beginning to be carried out. Mr. James Meredith is now in residence on the campus of the University of Mississippi.

> This has been accomplished thus far without the use of National Guard or other troops. And it is to be hoped that the law enforcement officers of the State of Mississippi and the Federal marshals will continue to be sufficient in the future.
>
> All students, members of the faculty, and the public officials in both Mississippi and the Nation will be able to return to their normal activities with full confidence in the integrity of American law.
>
> This is as it should be, for our Nation is founded on the principle that observance of the law is the eternal safeguard of liberty and defiance of the law is the surest road to tyranny. The law which we speak of includes the final ruling of the courts, as well as the enactments of our legislative bodies. Even among law-abiding men few laws are universally loved, but they are uniformly respected and not resisted.
>
> Americans are free, in short, to disagree with the law but not to disobey it. For in a government of laws and not of men, no man, however prominent or powerful, and no mob, however unruly or boisterous, is entitled to defy a court of law. . . . .

The same should hold true for the statutory safeguards established by Congress to protect the public fisc from the presentment and payment of false claims and frauds perpetrated by bribes, death threat and violations of established ethical standards and revolving door prohibitions addressed in the relevant provisions of Titles 18 and 31 of the United States Code. It is clear from the recent announcement of the

successor Information Technology contractual relationship between the Department of the Veteran Affairs, under Anthony Principi's cabinet level leadership, and Lockheed Martin that these interests and $3 billion of public funds are now and will continue to be at risk over the next eight years.

CONCLUSION

Wherefore, Petitioner respectfully prays for rehearing and a grant of his petition for a writ of certiorari.

Respectfully submitted,

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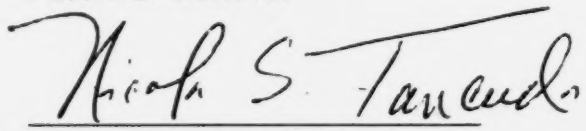
CERTIFICATION

The undersigned attorney for Petitioner hereby certifies that the accompanying Petition for Rehearing of the Denial of Petition for Writ of Certiorari is warranted by substantial grounds not previously presented. The undersigned attorney for Petitioner further certifies that the accompanying petition is limited to grounds set forth in Supreme Court Rule 44.2 and that it is presented in good faith and not for purposes of delay.

Respectfully submitted,
Nicola S. Tancredi



Attorney for Petitioner